United States Court of Appeals

for the Second Circuit

APPENDIX

Oregon

75-7458

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself and her infant child, TODD, and her intrauterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

against

GEORGE K. WYMAN, as Commissioner of the New York State Department of Social Services,

Defendant-Appellant.

APPENDIX

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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CYNTHIA HAGANS, et al v. GEORGE K. WYMAN, & ANO

'72C 182

DATE	PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
2/10/72	Complaint filed. Summons issued.	1JS5
2/10/72	By Costantino,J.-Order granting leave to pltffs to proceed in forma pauperis filed.	2
2/17/72	By Mishler,Ch.J.-Order to show cause dtd 2/10/72 with supporting memo of law for an order ret. 2/18/72 granting prel. inj. etc. filed.	3/4
2/18/72	Before Mishler,Ch.J.-Case Called for hearing on motion for prel. inj., t.r.o., 3-judge court,etc.-Motion argued-temporary restraining order granted-Case set down for trial on statutory claim 2/28/72	
2/18/72	Affidavit in opposition of James N. Callagher filed.	5
2/18/72	Memo of law in opposition filed. (Deft. WYMAN)	6
2/18/72	By Mishler,Ch.J.-Temporary restraining order filed.	7
2/18/72	Affidavit of service of order to show cause, T/C filed.	8
2-28-72	Before MISHLER, CH. J.-Case called-Trial on statutory claim ordered and begun-Trial concluded-Decision Reserved.	
2-29-72	Pltff's memorandum of law in support of a preliminary injunction filed.	9
2-29-72	Memorandum of law in behalf of deft George K. Wyman filed.	10
3-3-72	Order to show cause to punish for contempt etc. (ret Mar 6,1972)	11
3-6-72	BY: MISHLER, CH. J.- MEMORANDUM OF DECISION FILED. A permanent injunction may issue enjoining the defts from attempting to recoup such duplicate payments by reducing current AFDC payments This memorandum of decision contained findings of fact under Rule 52. Settle Judgment in accordance with this memorandum of decision on two days' notice. (See opinion)	12
3-6-72	Before MISHLER, CH. J.- Hearing on pltff's show cause to punish for contempt etc - Motion argued and adjd to 3-10-72 at 9:5[illegible]	13
3/10/72	Answer filed. (WYMAN)	
3-10-72	Before MISHLER, CH.J.- Motion to punish for contempt withdrawn.	
3-15-72	By MISHLER, CH. J.- MEMORANDUM OF DECISION on settlement of judgment dated 3-1[illegible]-72 filed. The court has this day signed the judgment proposed by Joseph Jaspan, County Attorney of Nassau County, Attorney for the deft James M. Shuart.	14

Chronoligical List of Relevant Docket Entries

82 CIVIL DOCKET CYNTHIA HAGANS, et al. v. GEORGE A. WYMAN & ANO.

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTER'S EMOLUMENTS RETURNED	
3-15-72	By MISHLER, CH. J.- JUDGMENT dated 3-14-72 filed. It is ordered that pursuant to Rule 23 F.R.C.P., this action is properly maintainable as a class action etc.				
	It is further ordered that §352.7(g)(6) of the Title 18 of the N.Y. Code of Rules and Regulations is hereby declared to be in violation of the Social Security Act; that the defts, their successors in office etc. are, permanently enjoined from enforcement or implementation of §352.7(g)6(of Title 18 of N.Y. Code of rules and regulations; it if further Ordered that defts reimburse all ADC recipients in the state who have had part of their grant recouped pursuant to 18 NYCRR §352.7(g)(6) during the months of Feb & March, 1972. for the amount recouped during those months. (P/C mailed to attys) lg				15
3-13-72	Unsigned notice of settlement (Pltff) filed.				16
3-15-72	Unsigned order & judgment (defts) filed.				17
3-15-72	NOTICE OF APPEAL FILED. (copy of appeal mailed to Leonard S. Clark, Esq. 1070 Old County Road, WestburyN.Y. 11590 Joseph Jaspan, Esq. County Atty of Nassau County, Nassay County Executive Building, Mineola, N.Y. 11501, U.S. Court of Appeals.				18
3-15-72	Stenographer's transcript filed.				19
3-27-72	Record on appeal certified and given to Michael Colonder, for delivery to Court of Appeals, receipt in file.				
3/29/72	Certified copy of index to record on appeal acknowledging receipt of record by C. of A. filed.				20
5/3/72	By Direction of Mishler, Ch.J. this case is marked closed.			--	JM
7-6-72	Certified copy of Court of Appeals order filed, that the order of said District Court is vacated and that the action is remanded to said District Court for further proceedings in accordance with the opinion of this Court. (see opinion)				21 JM
7/21/72	Before Mishler,Ch.J.-Case called-Conference held & cont'd to 7/28/72 at 9:30 AM				
8/14/72	Letter dtd 8/8/72 from Dept HEW filed.				22
10-2-72	Notice of motion filed, pursuant to Rule 24, for leave to intervene as pltffs etc. (ret Oct 6. 1972)				23

Chronological List of Relevant Docket Entries

72-C-182 CYNTHIA HAGANS, et al v. WYMAN & ANO.

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
10-6-72	Before MISHLER, CH. J. Hearing on pltff's motion to intervene etc. - Motion argued - Decision reserved.			
10-19-72	BY MISHLER, CH. J. - MEMORANDUM of DECISION FILED. The Clerk is directed to enter a judgment forthwith enjoining defts from attempting to recoup duplicate payments from AFDC benefit payments as mandated etc. The judgment is stayed for 5 days to afford defts an opportunity to apply to Cir. Court of Appeals for a further stay pending appeal (see opinion)			
10-19-72	JUDGMENT FILED. It is Ordered, adjudged and decreed that 18 N.Y.C.R.R. §353.7 (g)(7) etc. is declared to be null, void and of no effect and that deft K. Wyman as Comm. etc and James M. Shuart, etc. are restrained and enjoined from enforcing and implementing 18 N.Y.C.R.R. §353.7(g)(7). and that defts shall reimburse recipients of AFDC benefits with the sums deducted by them from benefits payments on and after Oct 1, 1972. (P/C mailed to attys)		25	J & L
10/20/72	Notice of appeal filed. (Copy of noticemailed to C of A)		26	C.H.J.
10-30-72	SUPPLEMENTAL INDEX ON APPEAL CERTIFIED and mailed to C/A. ;;11/10/72;; Certified copy of index to record on appeal (suppl) acknowledging receipt of suppl record by C of A filed.		27	
3-23-73	Certified copy of judgment and copy of opinion received from C of A remanding action to district court for dismissal filed.		28	
5-3-73	Record on appeal received from C of A. Acknowledgment mailed to Clerk for receipt.			
6-29-73	Record on appeal certified and mailed to C of A.			
6-29-73	Copy of letter from Clerk U.S. Court of appeals requesting record on appeal filed.		29	
11-15-74	Certified copy of judgment received from C of A reversing Judgment of this court 1-3-73 filed.		30	✓
11-22-74	Memorandum dtd 11-21-74 to J's Waterman, Friendly and Hays, US C of A, Second Circuit from Ch. J. Mishler re Order of October 23 filed.		32	
1-31-75	Before MISHLER, CH. J.-Adj'd to 2-7-75 for status report.			
2/7/75	Before MISHLER, CH. J. - Status report held and concluded.			
2-27-75	Certified copy of judgment from C of A that Dist. Court reconsider the issues in the case on the merits filed.		32	L

Chronological List of Relevant Docket Entries

72C 182

CRIMINAL DOCKET CYNTHIA HAGANS, et al v. WYMAN, et ano

DATE	PROCEEDINGS	
5-23-75	Memorandum for USA as amicus curiae filed.	33
6-24-75	Pltff's reply memorandum filed.	34
7-29-75	By MISHLER, CH. J-Memorandum of Decision dtd 7-28-75 re a permanent injunction may again issue enjoining the defts from attempting to recoup any advance allowance made to prevent eviction under 18 N.Y.C.R.R. Section 352.7(g)(7) filed. See Memo.	35
7-29-75	By MISHLER, CH. J.-JUDGMENT dtd 7-28-75 that 18 N.Y.C.R.R. § 352.7(g)(7) as amended contravenes 42 USC s 602(a)(7) and (a)(10) and 45 C.F.R. 233.20(a) and 18 N.Y.C.R.R. 352.7(g)(7) is declared null, void and of no effect, and it is further ordered that deft George K. Wyman, or his successors, are restrained and enjoined from enforcing and implementing 18 N.Y.C.R.R. 352.7(g)(7) and it is further ordered that deft shall reimburse recipients of AFCD benefits with sums disbursed by them from benefit payments on and after 7-1-75 and it is further order that the directions of this judgment and the enforcement of the same is stayed until 9-8-75 to afford the deft an opportunity to apply for a further stay from the 2nd Circuit Court of Appeals pending appeal filed. (p/c mailed)	36
8-6-75	Notice of appeal filed (Defts)	37

Judgment Appealed From dated July 28, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -

72 C 182

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself and her infant child, TODD, and her intrauterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

-against-

GEORGE K. WYMAN, as Commissioner of the New York State Department of Social Services,

Defendant-Appellant.

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JUDGMENT

MISHLER, CH. J.

The court having reconsidered the issues on the merits in the light of the regulations as amended as directed in the order of the Second Circuit Court of Appeals dated February 25,

Judgment Appealed From dated July 28, 1975

1975, and the court having filed a memorandum of decision stating its findings of fact and conclusions of law,

NOW, THEREFORE, it is

ORDERED that 18 N.Y.C.R.R. §352.7(g)(7) as amended contravenes 42 U.S.C. §602(a)(7) and (a)(10) and 45 C.F.R. §233.20(a) and 18 N.Y.C.R.R. 352.7(g)(7) is declared to be null, void and of no effect, and it is further

ORDERED that defendant, George K. Wyman, or his successors, as Commissioner of the New York State Department of Social Services, his agents and employees and all persons in active concert and participation with him are restrained and enjoined from enforcing and implementing 18 N.Y.C.R.R. §352.7(g)(7), as amended, and it is further

ORDERED that defendant shall reimburse recipients of AFCD benefits with sums disbursed by them from benefit payments on and after July 1, 1975, and it is further

ORDERED that the directions of this judgment and the enforcement of the same is stayed until September 8, 1975 to afford the defendant an opportunity to apply for a further stay from the Second Circuit Court of Appeals pending appeal.

Dated: Brooklyn, New York
July 28, 1975.

Jacob Mishler

JACOB MISHLER
U. S. D. J.

Decision of MISHLER, C.J., dated July 28, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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72 C 182

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KAREN HORNECK, for herself and her infant child, TODD, and her intrauterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

-against-

Memorandum of Decision

GEORGE K. WYMAN, as Commissioner of the New York State Department of Social Services,

Defendant-Appellant.

July 28, 1975

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MISHLER, CH. J.

Decision of MISHLER, C.J., dated July 28, 1975

This action was commenced in February, 1972, when certain recipients of grants under the Aid to Families with Dependent Children Program (AFDC), 42 U.S.C. §601 et seq., sought a determination of the validity of Section 352.7(g)(6) of Title 18 of the New York Code Rules and Regulations (NYCRR) under which an advance allowance made to a recipient to prevent eviction for nonpayment of rent could be deducted from subsequent grants.[1] In a memorandum of decision and order filed March 3, 1972, this court held that §352.7(g)(6) was in violation of plaintiffs' rights to equal protection of the law and that it also contravened §402(a)(7) and (a)(10) of the Social Security Act, 42 U.S.C. §602(a)(7) and (a)(10), and the regulations promulgated thereunder, 45 C.F.R.

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[1] Section 352.7(g)(6) stated at the time:

> For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title.

§233.20(a). Having found the New York regulation void, the court permanently enjoined the defendant from attempting to recoup duplicate payments.[2] Defendant appealed to the Second Circuit Court of Appeals; that court remanded the matter to the district court to determine the applicability on the recoupment procedures of the "fair hearing" requirement in 18 N.Y.C.R.R. §351.26. Hagans v. Wyman, 462 F.2d 928 (2d Cir. 1972). In passing, the Court of Appeals stated that the district court did have jurisdiction over the action under 28 U.S.C. §1343(3).[3] This court then permitted additional plaintiffs to enter the action, including some AFDC

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[2] In a subsequent memorandum of decision and order (March 14, 1972), the court found that the plaintiffs were not entitled to retroactive restoration of the recoupments which had been made by the state.

[3] 28 U.S.C. §1343(3) states:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

recipients who had been accorded a "fair hearing" under the New York regulation. After reconsideration of the issues in light of the Court of Appeals' instructions on remand, this court rendered a judgment identical to the one previously entered and enjoined the defendant from enforcing the recoupment provision. (See memorandum of decision and order dated October 19, 1972).

This judgment, as well, was appealed to the Second Circuit. The court discussed the purposes of New York's recoupment provision and found that the regulation had a rational basis. Therefore, under the principle enunciated in Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161 (1970) that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," the court determined that the plaintiffs had not presented a substantial constitutional claim. Since the constitutional claim was insufficient, the district court's jurisdiction to hear the statutory claim could not be sustained under the theory of pendent jurisdiction. The Court of Appeals again remanded the action, this time with instructions to dismiss for lack of jurisdiction. Hagans v. Wyman, 471 F.2d 347 (2d Cir. 1973). The United States

Supreme Court then granted certiorari to consider the jurisdictional issue. Hagans v. Lavine, 412 U.S. 938, 93 S.Ct. 2784 (1973).[4] The Supreme Court held that the district court did have jurisdiction under 28 U.S.C. §1343(3) and the pendent jurisdiction theory to consider the challenge to the state regulation. The Court stated that plaintiffs' constitutional claim could not be described as being totally without merit, and where the constitutional claim is sufficient to sustain federal jurisdiction, the district court may also hear any pendent claims based on state law. The district court may in fact decide those statutory claims before, and possibly without, reaching the constitutional claim. The Court reversed the decision of the Court of Appeals and remanded the action "for further proceedings consistent with this opinion." Hagans v. Lavine, 415 U.S. 528, 550, 94 S.Ct. 1372, 1386 (1974).

On April 24, 1974, the Second Circuit vacated its judgment and then directed the parties to file additional

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[4] Lavine replaced Wyman as the Commissioner of Social Services on May 1, 1972, and was substituted for Wyman in the proceedings before the Supreme Court.

briefs addressed to the statutory claim. The Court of Appeals subsequently vacated the judgment of the district court on October 23, 1974, with no further instructions to the district court. Finally, on February 25, 1975, the Court of Appeals directed this court "to reconsider the issues in the case on the merits, in light of the applicable regulations, as amended."

This court has twice previously held that the original New York recoupment regulation was void. The question to be answered now is whether the amendments which have been made since the date of the court's last decision have done anything to correct that invalidity. The present New York provision relating to recoupment is to be found in 18 N.Y.C.R.R. §352.7(g)(7) which states:

> For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided upon request to prevent eviction or to rehouse the family. Such an allowance may be provided only where the recipient has made a request in writing for such an allowance, and has also requested in writing that his grant be reduced in equal amounts over the next six months to repay the amount of the advance allowance. When there is a rent advance for more than one month, or more than one rent advance in a 12-month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title.

The State argues that the added requirement that the recipient consent in writing to recoupment of an advance allowance eliminates whatever deficiencies there were in the original regulation. Recoupment should be permitted under this provision because, according to the State, it is now clearly voluntary. But the real voluntariness of any recipient's consent is questionable. It is true that a consent given under this regulation would probably be a knowing consent, that is, the person giving it would know the consequences of consenting. There is a difference, however, between a knowing consent and a voluntary consent; the latter implies something more than mere knowledge of the consequences. Here, the circumstances surrounding the giving of the consent make the consent involuntary. The recipient is ostensibly given a choice, but it is a choice between consenting to the recoupment and being evicted. There is nothing more than a Hobson's choice. The recipient is forced by his situation to agree to the recoupment.

The basic purpose of the AFDC program has not changed. As stated in 42 U.S.C. §601, the program is intended to support and maintain family life and encourage the raising of dependent children in their own homes. The

recoupment provision violates this purpose by reducing in a given month the living allowance available to a grant recipient. It in effect punishes the dependent children for the mismanagement of funds by their parents who are actually little more than disbursing agents under this program.

The recoupment provision also appears to violate the most recent regulations promulgated by the Department of Health, Education and Welfare (HEW)to effectuate the goals of the AFDC program, that is 45 C.F.R. §233.20(a). The specific section, 45 C.F.R. §233.20(a)(12)(i)(a), prohibits recoupment of overpayment unless there is income currently available exclusive of the current assistance payment. /5 Only where the overpayment was caused by the recipient's willful withholding or misstating of income and resources may a state recoup an overpayment. According to a Program Instruction issued by HEW (APA-PI-75-11, December

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/5 This regulation is identical to the one in existence at the time of the court's original decision. At the urging of welfare agencies of various states, the regulation was changed, effective October 15, 1973, to permit recoupment from currently available income or from current assistance payments. That provision was held invalid by the District of Columbia District Court in National Welfare Rights Organization v. Weinberger, 377 F. Supp. 861 (D.D.C. 1972). The current regulation became effective July 10, 1974.

2, 1974), this regulation prohibiting recoupment applies only to involuntary reduction of future grants. Voluntary recoupment is permissible so long as the state has some procedures to ensure that a recipient's permission for the reduction has not been coerced. Defendant here argues that in light of this Program Instruction, the New York recoupment regulation is not in violation of 45 C.F.R. §233.20(a) because the recoupment is alleged to be voluntary. However, were the recoupment in fact voluntary, the state has given no evidence of the existence of any procedures which would ensure that consent to the recoupment was freely given other than the fact that it must be in writing. In any case, as stated previously, the consent to recoupment under the New York regulation cannot be said to be voluntary, and the regulation therefore does conflict with 45 C.F.R. §233.20(a)(12)(i)(a).

The opinion of the federal agency authorized to administer a certain program must certainly be given weight by a district court dealing with particular problems under that program. Rosado v. Wyman, 397 U.S. 397, 406, 90 S.Ct. 1207, 1215 (1970); Zemel v. Rusk, 381 U.S. 1, 11, 85 S.Ct. 1271, 1278 (1965). Pursuant to this court's request, HEW

submitted a memorandum as amicus curiae when the action was first remanded by the Second Circuit and again on this remand. In its first memorandum, HEW stated categorically that the recoupment regulation violated federal requirements because it assumed that the recipient had income available out of which the recoupment payment may be taken when there was in fact no income available in excess of the regular monthly payment. HEW was somewhat less decisive in its most recent memorandum. There it stated that there were a number of preliminary decisions which must be made by the court and that HEW could only suggest the "relevant considerations" which would have to be part of any ultimate conclusion.

As a first consideration, according to HEW, the court must determine whether the advance allowance is a payment to meet a current need or an overpayment. If the payment is made to satisfy a current need, then recoupment would not be permissible because it would be part of a properly paid AFDC grant. If, on the other hand, the advance allowance is an overpayment, then recoupment is allowed under certain circumstances. If the overpayment and consequent recoupment is consented to by the recipient, then the recoupment is in all likelihood permissible, or, in any

case, not covered by the federal regulations. Should the overpayment be considered involuntary, however, it may not be recovered except in the event that the overpayment was caused by the recipient's own wilful misrepresentation. Finally, HEW suggests that the possible conflict between the state and federal regulations might be avoided if the overpayment were recovered under New York's "prior month budgeting" system of allocating AFDC grants. Under this system, an overpayment in the budget month would reduce the grant in the payment month by an equivalent amount. However, the prior month budgeting concept would not permit extending the reduction over a six month period as the New York recoupment regulation does; the reduction can only be made in the payment month.

In reply to this memorandum from HEW, the state has argued that the rent advance to prevent eviction has always been considered an overpayment because it is not specifically included in the definition of items of need in §131-a of the Social Services Law. However, that definition does include an allowance for shelter. The advance given to prevent immediate eviction could well be considered an element in the shelter allowance. It is hard

to imagine how that payment could be said to be one in excess of the recipient's needs such as would permit recoupment according to §106-6 of the Social Services Law. Prevention of eviction is in a very practical sense a current need. The state has also responded to another point in the HEW memorandum and argued that the reduction in the grant because of the advance allowance is totally voluntary. The court has already discussed this position taken by the state. From all of the circumstances surrounding the consent to the recoupment, particularly the lack of any true choice, the consent cannot be held to be voluntary.

The language of the state's recoupment regulation has been changed since this court's original decision; the effect of the regulation, however, has not been altered. A monthly grant is still being reduced even though the recipient has no income available beyond that current grant. /6 The recoupment procedure is being used to teach proper management of funds; its result is to punish dependent children for allocation errors made by those who are

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/6 The state points out that the effect of the recoupment provision is softened by 18 N.Y.C.R.R. §352.31(d)(4) which limits the monthly deduction to no more than 10% of the household needs. Yet, a limitation on the amount of the recoupment does not eliminate its basic invalidity.

responsible for raising them. The recoupment provision, as it exists now, continues to contravene the intention and the language of the AFDC program as stated in the Social Security Act, 42 U.S.C. §601 et seq., and the regulations promulgated thereunder, 45 C.F.R. §233.20(a). The court has not been persuaded by any reason not to adhere to its original decision. Accordingly, a permanent injunction may again issue enjoining the defendants from attempting to recoup any advance allowance made to prevent eviction under 18 N.Y.C.R.R. §352.7(g)(7).

A judgment has this day been entered simultaneously with a filing of this memorandum of decision enjoining the defendant from attempting to recoup duplicate payments from AFDC benefit payments as mandated under 18 N.Y.C.R.R. 352.7 (g)(7).

U. S. D. J.

Memorandum for the United States as AMICUS CURIAE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CYNTHIA HAGANS, et al., Plaintiffs,	)	Civil Action No. 72-C-182
v.	)	
GEORGE K. WYMAN et al., Defendants	)	

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Introduction

This memorandum is submitted pursuant to this Court's written request to the General Counsel of the Department of Health, Education, and Welfare, dated February 25, 1975. The Court has inquired whether 18 NYCRR Section 352.7(g) contravenes Federal regulations appearing at 45 CFR Section 233.20. Regrettably, it is impossible for the Department of Health, Education, and Welfare (hereinafter "HEW") to furnish a categorical answer to the Court's inquiry because of the various preliminary findings and conclusions which must precede this ultimate answer; HEW can only set forth the relevant considerations which it believes should be utilized in arriving at a final decision once several disputed issues of fact and law are resolved by this Court.

Statutes and Regulations Involved

18 NYCRR Section 352.7(g) is attached hereto as Exhibit A. 45 CFR Section 233.20 is attahced hereto as Exhibit B. The essence of Section 352.7(g) is that assistance grants are made only to meet current needs. Subsection 352.7(g)(6),1/ however, states that when a recipient

1/This provision was more recently recodified as Section 352.7(g)(7). To avoid confusion we will continue to refer to it by its prior designation.

of public assistance is being "evicted for nonpayment of rent for which a grant has been previously issued", an "advance" rent allowance may be issued, upon the recipient's written request, to prevent eviction or rehouse the family. The statute requires the advance 2/ to be deducted from subsequent assistance grants over a period not to exceedsix months.

Federal regulations at 45 CFR Section 233.20 govern the circumstances under which State agencies may unilaterally and involuntarily recoup overpayments under title IV of the Social Security Act, 42 U.S.C. Section 401 et seq. 3/. Only two such circumstances are indicated in the regulations: when the recipient has income or resources exclusive of the current assistance payment in the amount by which the agency proposes to recoup, or when the overpayment was occasioned or caused by the recipient's willful witholding of information concerning income, resources or other circumstances affecting the amount of the assistance payment.4/

Discussion

1. Since the Federal recoupment regulations govern only recoupment of overpayments, the first issue which must be resolved is whether the duplicate rent assistance payment made by the State agency to prevent

2/ The "advance" will be referred to subsequently in this memorandum by the more neutral term, "duplicate rent assistance payment", in order to avoid any judgemental factors which may inhere in the term "advance".

3/ The terms of Section 233.20 also apply to the so-called "adult public assistance titles", titles I, X, XIV and XVI, but these were repealed by Section 303 of P.L. 92-603 except with respect to Guam, Puerto Rico and the Virgin Islands.

4/ The remainder of the Federal recoupment regulations defines circumstances under which willful witholding of information will be considered to have occured and imposes certain notice obligations on the State agency. The regulation was issued in response to the Order promulgated in National Welfare Rights Organization v. Weinberger, 377 F. Supp. 861, 869 (D.D.C. 1974), limiting recoupment to the circumstances described in the text.

eviction or rehouse the family, represents an overpayment . The New York rule is ambiguous, and HEW has never formally taken a position with respect to the matter.5/

On the one hand, the New York rule states that the duplicate rent assistance payment "is deemed a current need" when necessary to prevent eviction or rehouse the family. 18 NYCRR Section 352.7(g). On the other hand, Section 352.7(g)(6) refers to this duplicate rent assistance payment as an "advance allowance". If the duplicate rent assistance payment is indeed an advance allowance which is in excess of the monthly grant to which the recipient is entitled under the New York State AFDC plan, then it clearly represents an overpayment which may be subject to recovery. If, on the other hand, the duplicate rent assistance payment represents a current need of an AFDC family facing eviction, then the payment is not in excess of what such a family is entitled to under the New York State AFDC plan. In such event, no recovery is permissible under Federal regulations; a State may not recover any portion of a properly paid AFDC grant from a subsequent month's AFDC grant. In this situation, the HEW recoupment regulations directed to recovery of overpayment would be irrelevant and not applicable.

2. If this Court determines that the duplicate rent assistance payment is an amount to which the AFDC family is not entitled under the New York

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5/ The New York provision in question has been presented to HEW for approval as a plan amendment on several occasions in the last four years. The provision has consistently been disapproved, most recently in August 1974. With one somewhat ambiguous exception, all disapprovals were based on that portion of Section 352.7(g)(6) requiring restrictive payments when there is a rent advance for more than one month or more than one advance in a 12 month period. The propriety of this provision is not within the scope of the Court's request to HEW and will not be addressed herein. The most recent version of the New York Plan provision (encompassing the requirement for the recipients' written request for a duplicate rent assistance payment) was effective September 24, 1974. HEW has not yet ruled on its approvability.

State plan and constitutes an "overpayment" or "advance", then Federal regulations permit recovery under certain specified circumstances. However, not all of these circumstances involve the recoupment regulations at 45 CFR Section 233.20. First, the Federal regulations govern only the "involuntary reduction of future assistance payments to recover prior overpayments." (HEW, Social and Rehabilitation Service, Program Instruction, APA-PI-75-11. December 2, 1974, attached hereto as Exhibit C.) The recoupment regulations do not govern voluntary repayments of assistance overpayments.

> The reduction of future grants to recover an overpayment in a prior grant, with the recipient's permission, is not prohibited by HEW regulations. However, any State that provides for voluntary reductions should have procedures to assure that the recipients [sic] permission is, in fact, obtained freely and without coercion. Id.

HEW has not determined whether the most recent New York version of Section 352.7(g)(6) involves a recipient's agreement to repay the duplicate rent assistance payment "freely and without coercion." Should this Court so find, HEW believes that the repayment would neither contravene nor be affected by 45 CFR Section 233.20 or any other Federal regulation. There is no Federal interest in the terms of a voluntary agreement between a State agency and an AFDC recipient.

3. Under certain circumstances, it is also possible, without utilizing Section 233.20, to reduce the ensuing month's assistance grant to recover the duplicate rent assistance payment (if this Court holds that such duplicate rent assistance payment is an "overpayment"). It is HEW's understanding that New York utilizes a variant of a system called "prior month budgeting" to compute AFDC grants. Under this system, the assistance grant for, e.g., June, is computed in May based on the actual income received by the recipient in April (or some other "budget period" as in

New York). One of the concepts which underlays prior month budgeting is that all inflows in excess of the assistance grant to which the recipient is entitled under the State plan 6/ constitute income in the budget month, i.e., April. If this extra income is not statutorily required to be disregarded, it is utilized, together with all other nondisregarded income, to reduce the grant in the payment month, i.e., June. Thus, if a duplicate rent assistance payment of $100 is made to an AFDC family in April (and this Court holds that such duplicate rent assistance payment constitutes an amount in excess of the grant to which the family is entitled under the New York State plan), then the $100 received by the family during April constitutes income in that month and would reduce the assistance grant in June by an equivalent amount. HEW wishes to note, however, that stretching out the period of the reduction over six months is totally inconsistent with the concept of prior month budgeting. The reduction must be accomplished in the payment month or not at all.

4. There yet remains a limited set of circumstances in which the Federal recoupment regulations at 45 CFR Section 233.20 may be relevant and applicable. For example, under prior month budgeting, the reduction would have to be taken in the payment month, whereas recoupment would be permissible (if otherwise lawful) even if commenced several months after receipt of the duplicate rent assistance payment. The recoupment regulations would also permit the State to deduct the duplicate rent assistance payment in equal installments over a six month period whereas the prior month budgeting concept would not. 7/ Accordingly, it is necessary to examine the circumstances under which the Federal recoupment regulations would permit recovery of the duplicate rent assistance payment.

6/ Except for statutorily mandated disregards.

7/ 45 CFR Section 233.20(a)(12)(f) requires the States to limit the proportion of recoupment from current assistance payments "so as not to cause undue hardship on recipients."

In order for this regulation to be applicable, the Court must already have reached two conclusions. First, that the duplicate rent assistance payment is an "overpayment" and second, that the reduction of subsequent monthly assistance grants is not being done pursuant to any voluntary agreement on the part of the recipient. Given these predicates, we may also assume that the recipient does not have income or resources in excess of the current assistance grant currently available from which to repay the previous overpayment. It is then necessary to ascertain whether the recipient has willfully withheld information concerning his income, resources or other circumstances which might affect the amount of the payment, since it is the recipient who presumably notifies the welfare agency of his impending eviction and the reas therefor. A correct statement to the welfare agency of the reasons for nonpayment of the rent for which a grant has previously been issued, of the recipient's existing financial circumstances and of the imminence of the eviction, would furnish no basis for a conclusion that the recipient has willfully withheld relevant information. However, should the recipient misstate his income 8/, the circumstances causing the nonpayment of rent, or the imminence of eviction, then the recipient could be deemed to have willfully withheld relevant information. In this situation, the State would be justified in reducing assistance payments over that period of time necessary to (a) recover the overpayment and (b) insure that undue hardship is not caused to the recipient. If these factors exist in all circumstances, there would be no conflict between the New York rule and the Federal regulations. Nevertheless, since the New York rule does not limit recovery of the duplicate rent

8/ After the welfare agency has fulfilled the notice obligations placed on it by 45 CFR Section 233.20(a)(12)(i)(c)

assistance payment to situations involving willful withholding of information, the rule would violate the Federal recoupment regulations if this Court finds the Federal recoupment regulations relevant and applicable to recovery of duplicate rent assistance payments. However, as indicated above, it is (given certain predicates) entirely possible to validate the New York practice without reaching the potential conflict between the State rule and the Federal regulations.

CONCLUSION

Whether the New York rule appearing at 18 NYCRR Section 352.7(g) contravenes Federal regulations appearing at 45 CFR Section 233.20 is not a matter subject to ready or facile determination. As indicated in this memorandum, the Court must first resolve several preliminary issues before it even reaches the situation in which the Federal regulations are relevant or applicable. Even when the Federal regulations are applicable to New York's recovery of the duplicate rent assistance payment, the actual (as opposed to potential) conflict between the Federal regulations and the State rule poses an issue which can only be resolved on a case-by-case basis. If the AFDC recipient in question has withheld relevant information so as to bring himself within the parameters of Federally permissible recoupment, there would obviously be no conflict between the Federal regulations and the State rule and recoupment would be permitted by the Federal regulations. If the recipient has not withheld relevant information, the State would not be permitted to

recoup pursuant to Section 352.7(g) without contravening Federal regulations.

Respectfully submitted,

JOHN B. RHINELANDER
General Counsel
Department of Health, Education
and Welfare
Attorney for Amicus Curiae
Washington, D.C. 20201

OF COUNSEL:

Robert P. Jaye
Deputy Assistant General Counsel
Department of Health, Education, and Welfare

(ii) are eligible for public assistance other than AABD and ADC on the basis of income and resources;

(iii) agree to render necessary services and care to the recipient; and further provided that

(iv) the recipient approves the plan.

(2) *Additional allowance.* Each AABD recipient shall be allowed an additional allowance in the regularly recurring estimate of need in the amount of $10 per month for recipients living alone and $6.25 per month for recipients living with a family. For purposes of this requirement:

(i) a person shall be considered "living with a family" if residing with other members of his family group who are in receipt of public assistance;

(ii) the allowance shall only be provided to persons other than those residing in congregate facilities, such as a home for adults, home for the aged, boarding homes, or in family care arrangements; and

(iii) such allowance shall be provided for an "essential person" in AABD.

(g) *Payment for services and supplies already received.* Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need:

(1) *Replacement of lost or stolen checks.* (i) If an applicant or recipient reports to a local social services official that a check has been lost or stolen, an affidavit of loss shall be required of the recipient, and payment of the check shall be stopped. If the recipient has not already done so, he shall be required by the local social services official to report the loss or theft to the police, to obtain from them the blotter entry number, or classification number, or file number or other available evidence of the reporting, and to furnish such evidence to the local social services official. When satisfied that such police report has been made, the local social services official shall issue a replacement check to the recipient, on which there shall appear above the place for the recipient's signature, the following: "By endorsing or cashing this check I acknowledge that this is a replacement for a check, number ..... dated ..... drawn to my order on ..... which was lost/stolen; that I have not received the proceeds of said check directly or indirectly; and that I have been informed it is illegal for me to cash said check, and if I do so, I am liable to prosecution."

(ii) If payment is not stopped on the original check and it and the replacement check are both cashed, only one shall be subject to State reimbursement, and the social services district shall limit its claim for State reimbursement to one of the two checks.

(iii) If it is established that a recipient endorsed and cashed an allegedly lost or stolen check which has been replaced the amount of such check shall be recovered from the recipient as provided for by the provisions of the regulations of this department.

(2) An allowance to meet the cost of rent shall be made for the entire month in which the case is accepted if essential to retain the living accommodation.

(3) A grant to meet the cost of such items as taxes and interest on mortgages may be made for the billing period immediately preceding acceptance, if such payment is essential to the health and safety of the recipient.

(4) For an applicant for public assistance, a grant may be made to pay for utilities already furnished to prevent a shut-off or to restore services up to but not exceeding a four-month period immediately preceding the date of application, in the same dwelling for which he is applying for utilities.

(5) For a recipient of public assistance, an advance allowance may be provided to pay for utilities already furnished in the same dwelling in which he resides and for which a grant has been previously issued, to prevent a shut-off

Memorandum for the United States as Amicus Curiae

or to restore services. Such an allowance shall not exceed the cost of such utilities for the four-month period immediately preceding the advance payment, and may be provided only where the recipient has made a request in writing for such an allowance, and has also requested in writing that his grant be reduced in equal amounts over the next six months to repay the amount of advance allowance.

(6) A grant may be made to pay for rent, taxes or mortgage for a period prior to the month in which the case was opened or prior to the period in which a current bill was due when the case was opened under the following specified conditions:

(i) such payment is essential to forestall eviction and no other facilities are available;

(ii) the health and safety of the applicant or recipient is severely threatened by failure to make such payment; and

(iii) the authorization for payment of such a back bill receives special written approval by the social services official or such other administrative officer as he may designate, provided such person is higher in authority than the supervisor who regularly approves authorization.

(7) For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided upon request to prevent eviction or to rehouse the family. Such an allowance may be provided only where the recipient has made a request in writing for such an allowance, and has also requested in writing that his grant be reduced in equal amounts over the next six months to repay the amount of the advance allowance. When there is a rent advance for more than one month, or more than one rent advance in a 12-month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 351 of this Title.

(h) *Chattel mortgages or conditional sales contract.* If the furniture or household equipment of an applicant, who has not been a recipient of public assistance within the previous six months preceding his application, is essential to making his living accommodations habitable but are presently encumbered by a chattel mortgage or a conditional sales contract, every effort shall be made to defer, cancel or reduce payments on such chattel mortgage or conditional sales contract. If all such efforts fail, an allowance may be made for a compromise settlement of such payments or, if a compromise cannot be reached, for other essential payments; provided, however, that the compromise settlement or allowances shall not exceed the cost of replacement.

Historical Note

Sec. amds. filed: May 1, 1963; Jan. 9, 1964; Aug. 12, 1964; Apr. 23, 1965; Dec. 23, 1965; Apr. 20, 1967; Nov. 15, 1967; June 6, 1968; July 3, 1968; Dec. 24, 1968; repealed, new filed June 25, 1969; amd. filed Apr. 3, 1970; repealed, new filed June 2, 1970; amds. filed; Oct. 13, 1970; Dec. 4, 1970; Apr. 30, 1971; June 29, 1971; Aug. 2, 1971; Dec. 10, 1971; Feb. 22, 1972; Oct. 17, 1972; Mar. 2, 1973; Mar. 25, 1974; May 30, 1974; Aug. 19, 1974; Sept. 24, 1974 eff. Sept. 24, 1974. Amended (g)(5) and (7).

Decisions

1. Replacement of cash, clothing, furniture—catastrophe

Rule (18 NYCRR 352.7[g][1]) cited—stolen assistance check. *Matter of Diaz v. Wyman*, 41 AD 2d 722 (1973).

Held that the State Commissioner of Social Services properly ruled that losses due to theft and vandalism are not losses due to "catastrophe" within the meaning of Social Services Law § 131-a subd. 6 and 18 NYCRR 352.4(a) [cf. 352.7(d)], which authorize replacement of furniture and clothing lost as a result of fire, flood or other like catastrophe. *Matter of Howard v. Wyman*, 28 NY 2d 434 (1971), revg. 36 AD 2d 713 (1971).

Held that damage to petitioner welfare recipient's furniture caused by seven grandchildren, who had moved in with her for a period of three months because their apartment was destroyed by fire, constituted a "like catastrophe" (18 NYCRR 352.7[d]) or "emergency situation" (see 18 NYCRR 372.2 [a] [cf. 372.2]) entitling petitioner to an emergency grant to replace damaged furnishings. *Matter of Jones v. Kurtis*, 65 Misc 2d 556 (1971).

Held that a burglary resulting in loss of clothing and furniture is a "catastrophe" to a person dependent upon public assistance warranting emergency aid. Determination denying emergency grant to peti-

Memorandum for the United States as Amicus Curiae

EXHIBIT B

§ 3-1.703-3 Conclusiveness of certificate of competency.

As provided in the Small Business Act (15 U.S.C. 637(b)(7)), procurement agencies are required to accept SBA certificates of competency as conclusive of a prospective contractor's responsibility as to capacity and credit. The SBA will issue the following distribution of such certificates of competency:

[illegible] and to the cognizant DPSC procurement activity.

(2) Carbon copy to the operating agency's headquarters procurement office.

Dated: June 17, 1974.

JOHN OTTINA,
Assistant Secretary for Administration and Management.

[FR Doc.74-14295 Filed 6-20-74;8:45 am]

CHAPTER 5A—FEDERAL SUPPLY SERVICE, GENERAL SERVICES ADMINISTRATION

PART 5A-1—GENERAL

Subpart 5A-1.2—Definition of Terms

HEAD OF THE PROCURING ACTIVITY

This change to the General Services Administration Procurement Regulations (GSPR) reflects recent organizational changes in the Office of Procurement.

Section 5A-1.206 is revised as follows:

§ 5A-1.206 Head of the procuring activity.

"Head of the procuring activity" as prescribed in Chapter 5A, GSPR, includes: (a) In the Central Office, the appropriate Assistant Commissioner and the appropriate division director and (b) in the regional offices, the Regional Commissioner, FSS, and the appropriate Regional Director, Procurement Division or Transportation Management Division.

(Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c))

Effective date. This regulation is effective June 10, 1974.

Dated: June 10, 1974.

M. J. TIMBERS,
Commissioner, FSS.

[FR Doc.74-14258 Filed 6-20-74;8:45 am]

Title 45—Public Welfare

CHAPTER II—SOCIAL AND REHABILITATION SERVICE (ASSISTANCE PROGRAMS), DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

Recoupment of Overpayments and Correction of Underpayments

Part 233 of Chapter II, Title 45 of the Code of Federal Regulations is amended by revising § 233.20(a)(12) to comply with the Order dated April 11, 1974, of the United States District Court for the District of Columbia in National Welfare Rights Organization v. Weinberger (C.A. No. 1703-73). That Order declared the existing regulation appearing at 45 CFR 233.20(a)(12)(i) invalid and prohibited "recoupment from public assistance grants of prior overpayments when the recipient lacks income or resources available in the amount of the proposed reduction" except "where said overpayments were occasioned or caused by a recipient's willful withholding of information concerning his income and resources." The revised regulation set forth below complies with the Order. Moreover, the revised regulation requires the States to furnish examples of the most frequent situations in which such willful withholding might occur (though evidence presented by the recipient in those situations might negate the presumption of willfulness) and stresses that it is the obligation of the State agency to assure that recipients are aware of the information which must be reported.

Notice of proposed rulemaking has been dispensed with in order to meet the timetable required by the Order of the Court and avoid the substantial administrative inconvenience to the States which would result from the rescission of the previous recoupment regulation without its immediate replacement by a more limited one permitted by the District Court's Order.

Although normal rulemaking procedures have been dispensed with in order to make a contribution to prompt regulation, consideration will be given to any comments, suggestions, or objections thereto which are received in writing by the Administrator, Social and Rehabilitation Service, Department of Health, Education, and Welfare, Post Office Box 2382, Washington, D.C. 20013 on or before July 22, 1974. Comments received will be available for public inspection in Room 5324 of the Department's offices at 330 C Street, SW., Washington, D.C. on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (area code 202-245-0950), and will be given the same consideration they would receive if this were a notice of proposed rulemaking.

Part 233, Chapter II, Title 45 of the Code of Federal Regulations is amended by revising § 233.20(a)(12) to read as set forth below:

§ 233.20 Need and amount of assistance.

(a) *Requirements for State plans.* * * *

* * * * * * *

(12) *Recoupment of overpayments and correction of underpayments.* Specify uniform Statewide policies for:

(i) Recoupment of overpayments of assistance, including certain overpayments resulting from assistance paid pending hearing decisions.

(a) The State may not recoup any overpayment previously made to a recipient:

(1) Unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments; except that,

(2) Where such overpayments were occasioned or caused by the recipient's willful withholding of information concerning his income, resources or other circumstances which may affect the amount of payment, the State may recoup prior overpayments from current assistance grants irrespective of current income or resources.

(b) Withholding of information which is subject to the provisions of paragraph (a)(12)(i)(a)(2) of this section includes the following:

(1) Willful misstatements (either oral or written) made by a recipient in response to oral or written questions from the State agency concerning the recipient's income, resources or other circumstances which may affect the amount of payment. Such misstatements may include understatements of amounts of income or resources and omission of an entire category of income or resources.

(2) A willful failure by the recipient to report changes in income, resources or other circumstances which may affect the amount of payment, if the State agency has clearly notified the recipient of an obligation to report such changes. The recipient shall be given such notification periodically at times (not less frequently than semi-annually) and by methods which the State agency determines will effectively bring such reporting requirements to the recipient's attention;

(3) A willful failure by the recipient *(i)* to report receipt of a payment which the recipient knew represented an erroneous overpayment or *(ii)* to notify the State agency of receipt of a check which exceeded the prior check by at least the amount which the State agency had previously notified the recipient (pursuant to the provisions of paragraph (a)(12)(i)(c)(4) of this section) might represent an overpayment and constitute a sum to which the recipient would not be entitled. In making a determination pursuant to this paragraph (a)(12)(i)(b)(3), all relevant circumstances including the amount by which the erroneous payment exceeded the previous payment shall be considered.

(c) Each periodic notification under paragraph (a)(12)(i)(b)(2) of this section shall:

(1) Include a reminder that it is the recipient's continuing obligation to furnish to the State agency accurate and timely information concerning changes in income, resources, or other circumstances which may affect the amount of payment, within a reasonable specified period after such change. The recipient may also be notified that a failure to so notify the State agency within the designated time period may constitute a willful withholding of such information and permit the State agency to recover any overpayment occasioned or caused by the willful withholding;

(2) Specifically and comprehensibly in simple phraseology indicate the type of information to be disclosed by the recipient. Examples shall be furnished

of the most frequent types of newly acquired income or resources (e.g., inheritance, wages from a part-time job);

(3) Require that, if there is any doubt whether a particular change in circumstances constitutes such reportable information, the recipient contact the State agency or a designated representative thereof within a reasonable specified period of time after such change in circumstances;

(4) If the State plan provides for recoupment in the circumstances described in paragraph (a)(12)(i) (b)(3)(ii) of this section, notify the recipient that if the check received exceeds the prior check by a specified amount (which amount may not be less than that which a reasonable man should have known was erroneous), this increased check may constitute a sum to which the recipient is not entitled. In such instances, the notification may require that the recipient notify the State agency or a designated representative thereof prior to the negotiation of such check, so that corrective action may be taken; the State agency shall respond to such notification within 24 hours. The recipient may also be notified that a failure to so notify the State agency within the designated time period may constitute a willful withholding of such information and permit the State agency to recover such overpayment.

(d) The State agency shall require periodic formal acknowledgement by recipients (on a form utilized for this purpose) that the reporting obligations of this paragraph had been brought to the recipient's attention and that they were understood.

(e) Any recoupment of overpayments made under circumstances other than those specified in paragraph (a)(12)(i)(b) of this section shall be limited to overpayments made during the 12 months preceding the month in which the overpayment was discovered.

(f) Any recoupment of overpayments permitted by paragraph (a)(12)(i)(a)(2) of this section may be made from available income and resources (including disregarded, set-aside or reserved items) or from current assistance payment or from both. If recoupments are made from current assistance payments, the State shall, on a case-by-case basis, limit the proportion of such payments that may be deducted in each case, so as not to cause undue hardship or recipients.

(g) The plan may provide for recoupment in all situations specified [illegible] of the overpayment where the cost of collection would exceed the amount of the overpayment.

(h) Election by the State not to recoup overpayments shall not waive the provisions of §§ 205.40, and 205.41, or any other quality control requirement.

(i) Prompt correction of underpayments to current recipients, resulting from administrative error where the State plan provides for recoupment of overpayments. Under this requirement:

(a) Retroactive corrective payment shall be made only for the 12 months preceding the month in which the underpayment is discovered;

(b) For purposes of determining continued eligibility and amount of assistance, such retroactive corrective payments shall not be considered as income or as a resource in the month paid nor in the next following month; and

(c) No retroactive payment need be made where the administrative cost would exceed the amount of the payment.

* * * * *

(Sec. 1102, 49 Stat. 647, (U.S.C. 1302).)

(Catalog of Federal Domestic Assistance Program No. 13.761, Public Assistance—Maintenance Assistance (State Aid).)

Effective date. The regulations in this section shall be effective July 10, 1974.

Dated: June 12, 1974.

JAMES S. DWIGHT, Jr.,
Administrator, Social and Rehabilitation Service.

Approved: June 19, 1974.

FRANK CARLUCCI,
Acting Secretary.

[FR Doc.74-14372 Filed 6-20-74;8:45 am]

PART 250—ADMINISTRATION OF MEDICAL ASSISTANCE PROGRAMS

Medicaid; Federal Matching for Mechanized Systems; Correction

FEDERAL REGISTER Document 74-11462, published at page 17762 in the issue dated Monday, May 20, 1974, is corrected by changing the reference to "paragraph (b)(1)(ii)(B) and (C)" in paragraph (b)(2)(ii) to read "paragraphs (b)(1)(ii)(B) through (D)".

Approved: June 17, 1974.

THOMAS S. MCFEE,
Deputy Assistant Secretary for Management Planning and Technology.

[FR Doc.74-14294 Filed 6-20-74;8:45 am]

Title 47—Telecommunication

CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION

[Docket No. 18262]

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

PART 83—PUBLIC SAFETY RADIO SERVICES

PART 91—INDUSTRIAL RADIO SERVICES

PART 93—LAND TRANSPORTATION RADIO SERVICES

Future Use of Frequency Band; Order Setting Date for Filing Opposition

In the matter of an inquiry relative to the future use of the frequency band 806-960 MHz and amendment of Parts 2, 18, 21, 73, 74, 89, 91, and 93 of the Rules Relative to Operations in the Land Mobile Service Between 806 and 960 MHz, Docket No. 18262.

Order. 1. Informal request has been made to set a date for filing oppositions to petitions for reconsideration submitted in the above-captioned proceeding. The petitions in question are directed to the Commission's Second Report and Order in Docket No. 18262, 39 FR 16831 (May 10, 1974). These petitions were not all filed on the same date; consequently, under procedures established in the rules, the time for filing oppositions to these pleadings varies. For administrative reasons, it is desirable to have the filing date for all oppositions uniform; and the action, here, is taken for this purpose, in conformity with the mentioned request.

2. Accordingly, pursuant to the provisions of § 0.251(b) of the rules and regulations, the date for filing oppositions to the several petitions for reconsideration filed in this Docket is established as June 28, 1974.

Adopted: June 12, 1974.

Released: June 18, 1974.

FEDERAL COMMUNICATIONS COMMISSION,
[SEAL] ASHTON R. HARDY,
General Counsel.

[FR Doc.74-14286 Filed 6-20-74;8:45 am]

Title 49—Transportation

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

[Second Rev. S. O. 1112]

PART 1033—CAR SERVICE

Railroad Operating Regulations for Freight Car Movement

At a session of the Interstate Commerce Commission, Railroad Service Board, held in Washington, D.C. on the 13th day of June 1974.

It appearing, that there are acute shortages of freight cars throughout the country; that certain carriers are unable to furnish an adequate supply of freight cars to shippers located on their lines; that these shortages of freight cars are impeding both the domestic and export movements of agricultural, mineral, forest, and manufactured products, and other commodities; and that the existing car service rules, regulations, and practices of the railroads are ineffective with respect to the use, supply, control, management, distribution, exchange, interchange, and return of freight cars; to meet such emergency [illegible] the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

Memorandum for the United States as Amicus Curiae

Exhibit C

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

PROGRAM INSTRUCTION
APA-PI-75-11
December 2, 1974

TO: STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS AND OTHER INTERESTED AGENCIES

SUBJECT: Application of 45 CFR 233.20(a)(12) -- Recoupment of Overpayments

CONTENT: This program instruction is in response to a number of recent inquiries as to the application of the Federal Recoupment Regulation (45 CFR 233.20(a)(12)) to voluntary repayments of assistance overpayments and subsequent recovery of overpayments.

1. The Federal regulation on recoupment of overpayments places conditions on, and limits the involuntary reduction of future assistance payments to recover prior overpayments. The reduction of future grants to recover overpayment from any cause, with the recipient's permission, is not prohibited by the regulation. However, any State that provides for voluntary reductions should have procedures to assure that the recipients permission is, in fact, obtained freely and without coercion.

2. In situations where recoupment from the current assistance grant is not permissible under the regulation the overpayment itself is not extinquished. There is nothing to prevent a State agency's later recovery of the overpayment when the recipient obtains available income or resources. For instance the agency could reduce its claim for the overpayment to a judgement (either through court proceeding or consent of the individual) or utilize other State debt collection procedures.

INQUIRIES TO: SRS Regional Commissioners.

Commissioner
Assistance Payments Administration

Brief of the United States as Amicus Curiae

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CYNTHIA HAGGIS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
	)	
	)	Civil Action No. 72-C-182
v.	)	
	)	
GEORGE K. WYMAN, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

BRIEF OF THE UNITED STATES
AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Department of Health, Education, and Welfare on July 19, 1972 to participate in this action as amicus curiae.

Plaintiffs have challenged the validity of a New York State welfare regulation which permits the state to advance certain welfare payments to families which are in danger of eviction from their homes because of nonpayment of rent and requires the state to recoup these advanced sums by reducing the amount of the families' welfare checks over the succeeding six months, until the advanced sum has been thereby recovered. The regulation, 18 N.Y.C.R.R. § 352.7(g)(7), provides in part that:

> For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months.

On March 3, 1972, this court permanently enjoined the state from implementing and enforcing that regulation. The United States Court of Appeals for the Second Circuit vacated that order and remanded the case to this court for further consideration on June 5, 1972.

Two issues were presented by the Court of Appeals for consideration upon remand: first, whether the New York recoupment policy violates sections 402(a)(7) and 402(a)(10) of the Social Security Act, 42 U.S.C. 602(a)(7) and 602(a)(10), and applicable HEW regulations, and, second, whether such recoupment consitutes a reduction in grant so as to require the state to provide affected recipients with an opportunity for a fair hearing. The discussion in this brief is directed primarily to the first question, whether the recoupment provided for in the New York regulation contravenes federal requirements.

HEW believes that the New York regulation does contravene federal requirements because it assumes for particular months the existence of income and resources which by definition are not currently available for such months.[1/] The Social Security Act does not permit the assumption, without proof, that income which might have been available to a recipient in past months is still available. Instead, the actual availability of such income is the controlling test. The Act provides only for federal assistance with respect to state payments for current needs which have been determined to exist in the month for which the payment is made. It does not permit

1/ The New York regulation in issue has been submitted to HEW as part of the New York state plan. HEW has not approved the plan provision and has apprised the state that the provision does not comport with federal requirements. (See Appendix A).

accelerated payments or repayable loans, which is, effectively, the characterization which New York places upon such payments under 18 N.Y.C.R.R. 352.7(g)(7). The Social Security Act does not require states to provide such emergency payments as are authorized under the New York regulation, but if they do so, they must abide by the federal requirements governing determination of the availability of income and determination of need on an objective and equitable basis. The Act does provide, however, other mechanisms for attacking the emergency housing problems to which the New York regulation is addressed, including protective payments and emergency assistance.

DISCUSSION

I. Section 352.7(g)(7) assumes the existence of resources not currently available for the support of the recipient, thereby contravening section 402(a)(7) of the Social Security Act and implementing federal regulations governing the consideration of income, 45 C.F.R. 233.20(a)(3)(ii)(c).

Public assistance, generally, is a "residual" program, designed to provide financial aid for unmet subsistence needs after other income and resources have been taken into account. The public assistance programs under the Social Security Act were enacted to provide federal funds to states for assistance granted by the states to certain specified categories of needy individuals. The Act sets out certain conditions that a state plan for AABD or AFDC[2]/ must meet in order to qualify for federal funding; however, the

2/ Plaintiffs in this case are recipients of Aid to Families With Dependent Children (AFDC) under the New York State AFDC program, established pursuant to Title IV of the Social Security Act, 42 U.S.C. 601 et seq. However, since § 352.7(g)(7) applies both to the state's AFDC program, and its combination assistance program for adults, Aid to the Aged, Blind and Disabled (AABD), established pursuant to Title XVI of the Act, 42 U.S.C. 1381 et seq., reference is made in this brief to its applicability to both programs.

state determines the standard of need applicable to individuals eligible for assistance under the programs and the degree to which the state will meet that need. See King v. Smith, 392 U.S. 309, 318-319 (1968); Jefferson v. Hackney, 406 U.S. 535 (1972).

The title IV and XVI programs are designed to offer financial support for individuals who are "needy." 42 U.S.C. 601, 606(a). This condition of eligibility for assistance under the programs necessarily involves evaluation as to the individual's needs and his means to satisfy them. Section 402(a)(7) of the Act, 42 U.S.C. 602(a)(7) requires that a state, in determining need, shall

> take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . .

A similar provision of the Act applies to state plans for AABD at 42 U.S.C. 1382(a)(14).

Although the statute does not contain a more explicit formula for determining need, it seems clear that Congress did not intend that welfare be given to individuals with sufficient means to maintain themselves; hence, the requirement that the states, in determining need, take into consideration the individual recipient's income and resources. On the other hand, Congress surely did not intend that individuals covered under the AFDC and AABD programs be charged with income and resources which are merely assumed to be at their disposal. Thus, HEW believes that while states are required to consider the individual's income and resources, they may consider only those items which the recipient actually has at his disposal. Thus, HEW has consistently interpreted these sections as permitting the state to consider as available to the recipient only income and resources which are actually at the recipient's disposal in a particular month, and as disallowing states from creating presumptions of availability of income. 45 C.F.R. 233.20(a)(3)(ii). 45 C.F.R. 233.20(a)(3)(ii)(c) states that a state plan for AFDC and AABD must provide that, in establishing financial eligibility and the amount of the assistance grant,

> only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered.

The Supreme Court has upheld HEW's interpretation of 42 U.S.C. 602(a)(7) as embodied in the regulation (and its predecessor provisions) on a number of occasions. In King v. Smith, 392 U.S. 309 (1968), the Court

held that Alaba could not find a child ineligible for AFDC simply because of the presence in his home of a "substitute father" who was presumed to support the child regardless of whether he did so in fact. While the Court found that any regular and actual contributions from the substitute father toward the child's support could be considered in determining the need of the child, it rejected the state's contention that the state could assume, without proof, that such income was being provided to the child. Relying heavily on the HEW Handbook of Public Assistance Administration (now superseded by 45 C.F.R. 233.20(a)(3)(ii)(c)), the Court stated:

> Regulations of HEW, which clearly comport with the statute, restrict the resources which are to be taken into account under § 602 to those "that are, in fact, available to an applicant or recipient for current use on a regular basis...." This regulation properly excludes from consideration resources which are merely assumed to be available to the needy individual.
> (392 U.S. at 319, n. 16.)

Again, in Lewis v. Martin, 397 U.S. 552, at 559 (1970), the Supreme Court upheld the validity of the HEW regulation, leaving no doubt that it considered the HEW interpretation of 42 U.S.C. 602(a)(7) to be clearly justifiable. Similarly, in Amos v. Engelman, 333 F. Supp. 1109, (D.N.J. 1970), aff'd. 404 U.S. 23 (1971), the Supreme Court in effect re-affirmed the imprimatur which it had previously placed upon the HEW assumption-of-income rule in its earlier decisions. Although the Court did not address the issue specifically, it re-affirmed the decision of the district court on this point:

> We do, however, conclude that wherever New Jersey uses the income of a stepfather or paramour without proof of its availability, it violates the federal statute. Lewis v. Martin, supra. This is true although there is no provision in the New Jersey regulation like the one in California which conclusively presumes the needs of the children are reduced by the amount of income from the man in the house.
> (333 F. Supp. 1119)

The issue presented here as to whether recoupment violates federal standards is much the same as that presented in Acosta v. Swank, 312 F. Supp. 765 (N.D. Ill. 1970); 318 F. Supp. 1348 (N.D. Ill. 1970), which involved a "duplicate assistance" payment system under which the state recovered, by means of deductions from subsequent assistance checks, amounts furnished as emergency disbursals for food and clothing. In that case the Court ruled initially that the Illinois "duplicate assistance" policy did not deny plaintiffs equal protection of the law and was not in conflict with 45 CFR 233.20(a)(3)(ii)(c). 312 F. Supp. 765. On rehearing, after HEW had filed a brief as amicus curiae in which it took the position that the Illinois regulations contravened federal requirements, the court withdrew its earlier decision, noting that as a result of negotiations with HEW, the state had amended its policy so as to conform with the HEW regulation:

> The court finds implicit in the above statements the admission that when this court's opinion was filed there was a conflict between the Illinois Department of Public Aid "duplicate assistance" policy and HEW regulations; and further finds that its opinion of May 11, 1970 should be and it is hereby withdrawn.
> (318 F. Supp. 1349-1350)

The critical issue to be determined in the present case revolves around the meaning of the term "available." HEW believes that in those instances in which the state recoups from the recipient's assistance check the amount which the recipient has previously received as an advance rent allowance pursuant to section 352.7(g)(7), it in effect assumes that the funds extended to a recipient to meet an emergency in one month remain available for his support in a subsequent six-month period. This sort of

assumption of income availability violates a central tenet of the federal program. An emergency disbursal for rent is issued to meet an actual current need of the recipient. The basis for federal matching of such a disbursal at the time it is made is that it will be spent to satisfy only a need which exists in the month for which the assistance is granted, not that it will be used to permit the recipient to accumulate savings. The Social Security Act does not permit accelerated payments or repayable loans. It deals only in terms of present need, as determined each month. Although New York apparently claims that its policy is merely an administrative device for recovering excess assistance, the underlying rationale and necessary effect of the policy nevertheless is to assume that the emergency disbursal, which was made to meet current needs, remains available to the recipient in later months, thereby producing the very result which the HEW regulation is designed to

prevent. The regulation seeks to prevent the states from relying upon presumptions about the availability of income in any month without proof of the validity of the presumption in each particular case.[3/]

Moreover, for purposes of claiming federal matching funds, New York treats these disbursals as correct payments. Federal funds can be utilized only to match payments of assistance, but not payments otherwise characterized, such as loans. There is, then, no reason to treat these disbursals differently from any other correct payment.

Finally, we would emphasize the words of the Social Security Act. The state agency, in determining need, shall take into consideration any other income and resources. 42 U.S.C. 602(a)(7), 1382(a)(14). Assistance which was correctly paid in the past is not to be taken into consideration.

B. 18 N.Y.C.R.R. § 352.7(g)(7) is inconsistent with the federal requirement in section 402(a)(10) of the Social Security Act and implementing federal regulations that assistance be paid to all eligible individuals.

The New York policy is also inconsistent with other provisions of the Social Security Act and regulations dealing with the amount of the assistance payment. Section 402(a)(10) of the Act, 42 U.S.C. 602(a)(10),

3/ One application of the general principle that the state may consider only actually available income and resources in determining need is found in 45 C.F.R. § 233.20(a)(3)(ii)(d) which provides that states may not recover overpayments of assistance for any month by reductions in future assistance checks unless the recipient has at his disposal resources equal to the amount of the proposed reduction (except where caused by the recipient's willful failure to disclose relevant information). That regulatory provision is not directly involved here. However, it does present an instructive analogy for the instant case. If the state's right to recover overpayments, which by definition are mistaken payments to the recipient exceeding his needs for that month, is so restricted, it is even more important that the state not be allowed to recover an emergency payment which was correctly issued to meet an actual present need by a device that considers income or resources not in fact available to the recipient.

requires that a state AFDC plan must provide that:

> all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals...

A similar requirement is imposed on AABD plans by 42 U.S.C. 1382(a)(8). Federal regulations on need and amount of assistance, 45 CFR § 233.20(a)(1), establish as an overriding general principle that a state AFDC and AABD plan must

> Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an equitable and objective basis and all types of income will be taken into consideration in the same way, except when otherwise specifically authorized by Federal statute.

More particularly, these provisions have been interpreted by HEW to require formal procedures for determination of eligibility and the amount of the assistance check. Part IV, Section 3800, of the Handbook of Public Assistance Administration which covers the authorization of award provides that:

> The authorization of award serves the dual purpose of certifying eligibility and signifying the agency's decision to grant assistance in a specified amount. The authorization of award thus becomes a matter of formal agency record which certifies that the recipient has met the conditions set forth for eligibility and extent of need, and that, unless and until those conditions are changed or the recipient's circumstances change, the recipient may look to the agency to fulfill its expressed intention to make regular payments in the amount awarded. (Emphasis added).

the award authorization is made when the state agency acts favorably on an individual's application. When the amount of the award is changed, federal regulations require prior notice and opportunity for hearing.

Thus, although the states have a great degree of discretion in determining the standard of need of individuals covered by the various public assistance programs and the degree to which the state will meet that need, once the state has made its determination in regard to a particular individual or family, it is bound by its initial determination until it formally concludes that a change in circumstances warrants a redetermination. The state must treat all individuals fairly, equitably, and according to formal procedures in the process of assessing eligibility and amount of assistance payment. Moreover, all individuals with the same needs and the same income and resources must be dealt with in the same manner.

The emergency housing cost disbursals at issue here are provided at state option. The state does not have to make such payments, but if it does, it must do so equitably, in accordance with formal procedures. The New York policy results in situations in which, in some months, the recipient receives an assistance payment that is lower than the amount of the authorized award. Yet, the state has made no redetermination of award on the basis of changed circumstances. Nor should such a redetermination have been made, since the recipient is still as needy. Indeed, the only time the recipient's circumstances changed was months earlier, and then for the worse.

C. The New York regulation frustrates the primary purpose of the Act.

It has been argued that the New York repayment policy is designed to deter mismanagement of the assistance grant by recipients. There can be no doubt that the state has a valid interest in dealing effectively with situations in which recipients are unable to manage their assistance checks. A recipient who constantly requires emergency aid because of mismanagement uses state public assistance funds which could be given to recipients who manage them properly. HEW does not question the validity of the state interest in avoiding this result, but only the fact that the means chosen to accomplish this interest conflict with a primary purpose of the Act and effectively punish the needy child for parental mismanagement. If the purpose of the AFDC program were to train needy individuals in the proper techniques of money management, the New York advance or duplicate assistance policy might not present a problem. However, that is not a primary purpose of the Act.

Congress has clearly stated in section 401 of the Social Security Act, 42 U.S.C. 601, that the purpose of the AFDC program is to enable the states to provide needy, dependent children with financial assistance and social services. The Supreme Court has found that states may not pursue other interests in connection with the AFDC program by means which frustrate this primary purpose. In King v. Smith, supra, Alabama defended its "substitute father" policy on the grounds that it served a valid state interest in discouraging immorality and illegitimacy. The Court stated:

> "In sum, Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish

> dependent children, and that protection of such children is the paramount goal of [AFDC]." (392 U.S. at 325.) (Emphasis added)

Similar rationale was used in Cooper v. Leonhairer, 316 F. Supp. [illegible] (E.D. Pa. 1970), in which the court invalidated a Pennsylvania regulation providing for the recovery of duplicate assistance checks by reductions in the amount of future checks:

> [The State policy] punishes the child by depriving him of a substantial portion of AFDC assistance which he is eligible to receive because his mother mistakenly or fraudulently obtained an extra payment months ago. The State has a legal right to recover from the mother funds which she was not entitled to receive but it cannot recover these funds by reducing current assistance to the child. The target and primary beneficiary of AFDC aid is the child; the mother is merely the conduit through which the funds are channeled to the child...the state cannot permit a child to starve or be deprived of aid that he needs because of the mother's budgetary mismanagement..."
> (316 F. Supp. at 269.)

The necessary effect of the New York policy is to reduce the amount of aid available for the support of the needy child in those months in which reductions are made to recover the amount of the prior emergency payment. This necessarily means that, during that period, the needy child or children must survive on an amount that falls below the standard of need established by the state. Yet, the needy child has not mismanaged the past assistance payment or in any conscious way created the need for emergency assistance. For this reason, HEW feels that it is clearly contrary to the purposes of the AFDC program to deprive the child by causing a reduction in the current assistance check in order to achieve state interests, in this case, teaching proper money management to welfare

recipients and providing for efficient utilization of limited state public assistance funds, that can be achieved in ways that do not run contrary to the purposes of the program. Other such methods are provided for in the Act. These are discussed in part D of this brief.

D. The purposes of the New York policy can be served by alternative means provided for under the Social Security Act.

Federal law and regulations provide means by which the state can protect itself against duplicate payments such as are involved here. Congress has recognized that recipient mismanagement is a pressing problem which must be solved in a way that will forward the purposes of the AFDC program. Section 406(b) of the Act, 42 U.S.C. 606(b) authorizes federal matching for protective payments made "to another individual who...is interested in or concerned with the welfare of such child...," and for vendor payments made directly to a person furnishing food, living accommodations, or other goods, services, or items. In enacting the Social Security Amendments of 1967 (which made mechanisms for protective and vendor payments mandatory on the states),[4/] Congress indicated clearly that this provision was "a tool to deal with an infrequent but persistent problem of misuse of assistance money." H.R. Rep. No. 544, 90th Cong., 1st Sess. 101-102(1967). The record indicates that New York is in fact using this method of payment.

Title XVI also authorizes federal matching for protective payments for the aged, blind and disabled (but not vendor payments). Section 1605(a)

4/ The requirement under section 402(a)(15)(B)(ii) of the Act, 42 U.S.C. 602(a)(15)(B)(ii), that states have provisions for protective and vendor payments for Title IV non-WIN cases was repealed by Pub. L. 92-223, § 3(a)(1) (December 28, 1971), effective July 1, 1972. States may now at their option provide or not for protective and vendor payments in such cases, with federal matching.

of the Act, 42 U.S.C. 1305(a).

A second means for handling such situations for needy families with children is by provision of "emergency assistance," which may be matched by federal funds pursuant to section 406(e) of the Social Security Act, 42 U.S.C. 606(e). Emergency assistance is designed to take care of the same sort of situations which § 352.7(g)(7) covers, such as a recipient's loss of his home. New York has statutory authority for such assistance already in place. Section 350-j of the New York Social Serives Law provides in part:

> 3. Emergency assistance to needy families with children shall be provided in accordance with the regulations of the department to children who are without available resources, and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home, and such destitution or such need did not arise because such children or relatives refused without good cause to accept employment or training for employment.

E. Recoupment under 18 N.Y.C.R.R. § 352.7(g)(7) represents a reduction of the assistance grant for purposes of the fair hearing regulations.

The recoupment provided for under the New York regulation would thus be a "reduction" of assistance within the meaning of federal regulations requiring fair hearings in cases in which the grant is reduced, suspended, or terminated. 45 C.F.R. 205.10. Therefore, such recoupment may not properly be made without 15 day's advance notice of the intended reduction. However, as discussed, the recipient should not be required to resort to a state agency fair hearing, which would in any event be futile in light of the New York policy. Instead, the issue should be resolved by decision in this case that, insofar as New York does reduce the grant in this manner, it is violating federal standards.

Exhibit A

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

December 29, 1971

Mr. George K. Wyman, Commissioner
N.Y. State Dept. of Social Services
1450 Western Avenue
Albany, N.Y. 12203

Re: Plan Submittal 71-68
(Standard of Assistance)

Dear Commissioner Wyman:

On November 15, 1971 we wrote you with reference to Submittal 71-61 advising that Regulation 352 g (6), cited as 352 g (7), in providing for deductions from subsequent grants of funds duplicated to avoid eviction is contrary to Federal Program Regulation 20-7. We would like to bring to your attention that Submittal 71-68 continues the cited provision now in Regulation 352.g (7) and adds a new subdivision (8) 5 of Regulation 352, which has the same deficiency relative to subsequent deductions of duplicated payments.

We have noted that in these two citations restrictive payments "may" be made of subsequent grants. Regulation 352. 7 (g) (1) providing for the handling of rent payments subsequent to fraudulent claims of non receipt of checks also indicates use of a restrictive payment. As you know, restrictive payments are not subject to Federal participation unless they fall within the Federal program guides in Regulations 20-4 and 20-5 (Protective Payments).

If it is felt that discussion of any of the foregoing is indicated; staff of the Regional Office is available.

Sincerely yours,

Elmer W. Smith
Regional Commissioner

JDP:bf
cc: Mr. Smith
Mr. B. Inger
Audit Agency

FILE	OFFICE	SURNAME	DATE	OFFICE	SURNAME	DATE	OFFICE	SURNAME	DATE
MDW			12/29						

Copy received
9/9/75
Carl Joy Mattenson
attorney for Appellees